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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Implementation of Section 703(e)	)	
of the Telecommunications Act	)	
of 1996	)	CC Docket No. 97-151
	)	
Amendment of the Commission's	)	
Rules and Policies Governing Pole	)	
Attachments	)	

REPLY COMMENTS OF KMC TELECOM INC.

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October 21, 1997

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Summary

Section 224 of the Communications Act imposes a legal obligation on utilities to provide telecommunications carriers non-discriminatory access to their poles, conduit and rights-of-way at just, reasonable and non-discriminatory rates. The FCC must adopt specific rules to determine maximum rates and impose an absolute requirement of non-discrimination to ensure that the mandates of Section 224 are respected -- not ignored -- by utilities. Almost two years after passage of the 1996 Act, utilities routinely insist that telecommunications carriers agree to "negotiated agreements" that include rates, terms and conditions that are discriminatory and unjust and unreasonable. It is in this context, that the FCC must scrutinize the utilities comments and their eagerness to move to binding negotiations and have the FCC adopt ambiguous rules.

KMC encourages to the Commission to implement the full intent of Congress to remedy the inequity of charges for pole attachments among providers of telecommunications services by adopting rules consistent with the following twelve principles:

1) Rates, terms and conditions for pole attachments must be uniformly applied to telecommunications carriers as set forth in the Commission's Local Competition Order;

2) Negotiated agreements must effectively honor the requirements of Section 224 for just, reasonable and non-discriminatory rates and contractual waivers of a telecommunications carrier's legal rights under Section 224 must be declared unjust, unreasonable and unenforceable;

3) The complaint process must provide a realistic option for enforcement of Section 224 by providing a deadline for Commission action within 90 days of the filing of the final pleadings and rejecting the utilities' call for a mandatory six month negotiation period or notice of intent to file a complaint that would only further delay access for pole attachments;

4) The cost-basis for calculating maximum pole attachment rates must be consistent for cable television providers and telecommunications carriers and continue to be based on historic costs that can be verified;

5) Overlashing should be subject to a separate agreement and pole attachment fee only if performed by an unaffiliated third-party without a pole attachment agreement;

6) Utilities must be prohibited from restricting or conditioning dark fiber leases;

7) All attaching entities, regardless of whether they are entitled to rate protection under Section 224, must be considered "attaching entities" under Section 224;

8) Utility presumptions on the number of attachers must be developed separately for rural, urban and suburban areas;

9) Safety space may be allocated as unusable space;

10) A specific formula must be adopted for determining maximum conduit rates;

11) Right-of-way rates must be limited to recovery of direct costs; and

12) Cable television providers should be required to certify that they are providing solely cable television services on an annual basis.

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In the Matter of	)	
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	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

Reply Comments of KMC Telecom Inc.

KMC Telecom, Inc. ("KMC") hereby files its reply comments in the above-captioned proceeding. The comments in this proceeding demonstrate the vastly different experience and negotiating strength of utilities (including Incumbent Local Exchange Carriers ("ILECS")) and telecommunications carriers in negotiating the rates, terms and conditions for pole attachments. It is the existence of this unequal bargaining position that prompted Congress to extend to telecommunications carriers in the Telecommunications Act of 1996 (the "1996 Act") the rate protection previously provided only to cable television systems under Section 224 of the Communications Act (the "Act"). The utilities in their comments encourage the FCC to remove their legal obligations under Section 224 by permitting negotiated agreements with telecommunications carriers to override the protections contained in Section 224. As demonstrated by the comments filed by telecommunications carriers offering competitive services today, such as ICG Communications, Inc. ("ICG") and KMC, even after the passage of the 1996 Act, utilities routinely refuse to comply with the requirements of Section 224 and insist that "negotiated agreements" include rates, terms and conditions that are discriminatory and unjust and unreasonable.

I. Good Faith Negotiations Must Adhere to the Requirements of Section 224

The concept of "negotiation" is not one that has characterized the bulk of KMC's pole attachment agreements with utilities. Utilities have recognized and used to their advantage the importance of time to market for new competitive entrants. Utilities have used the ability to delay pole access, and therefore network construction, to extract agreements from telecommunications carriers that directly violate the

requirements of Section 224. To further remove the telecommunications carrier's options, utilities often insist that a telecommunications carrier waive its legal rights to seek FCC and judicial review of a pole attachment agreement. [1] It is in this context, that the FCC must scrutinize the utilities eagerness to move to binding negotiations and ambiguous rules.

Only against a regulatory backdrop of precise rules that establish a formula for maximum rates and non-discrimination will negotiations between utilities and telecommunications providers produce rates, terms and conditions that comply with Section 224 of the Act. Negotiations should not be viewed as a means to evade a utility's obligations under Section 224 but rather a means to effectively honor those obligations in a specific context with a particular provider. The FCC must adopt specific formulas to determine maximum rates and impose an absolute requirement of non-discrimination to provide the necessary framework for negotiations. This level of specificity is the only means of ensuring that the mandates of Section 224 are respected -- not ignored -- by utilities.

II. The Complaint Process Must Provide Telecommunications Carriers a Realistic Option for Enforcement

The complaint process at the FCC must be seen as a realistic option for telecommunications carriers to assert their rights under Section 224. The current complaint process is not a realistic option for telecommunication carriers such as KMC that are eager to get to market and offer competitive services. The complaint process is open ended with an unknown end point that could result in years of delay in obtaining pole attachments. Recently, KMC was faced with signing an agreement that violated the fundamental requirements of Section 224 or filing a complaint at the FCC. KMC concluded that the complaint process, including subsequent challenges to any FCC decision, would likely take a minimum of one year during which time KMC would not be able to obtain pole attachments in the market. In the race to market, a delay of one year is fatal to certain business opportunities.[2] In addition, a one year delay

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[1] See Joint Comments of American Electric Power Service Corp., Commonwealth Edison Company, Duke Energy Corporation, Florida Power & Light Company ("Joint Electric Utilities") at 18.

[2] See ICG Comments at 11 (discussing critical nature of time to market and business opportunities lost due to delay in obtaining pole attachment agreements).

would not meet KMC's aggressive business objectives of providing competitive services expeditiously. If the promise of local competition is to be achieved, as envisioned with the passage of the 1996 Act, the complaint process must provide a short predictable path that does not delay market entry indefinitely. Accordingly, KMC renews its request for a specific time frame of 90 days for completion of FCC action on a pole attachment complaint after the final pleadings are filed.

KMC also endorses ICG's recommendation that the FCC adopt a rule to permit telecommunications carriers to install their facilities before they execute a pole attachment agreement.[3] ICG's proposal would ensure that utilities do not undercut the requirements of Section 224 by delaying agreements, entering into protracted negotiations, or insisting upon unjust, unreasonable and discriminatory terms. As the Commission recognized in its Local Competition Order, a pole attachment agreement is not a pre-condition for pole access.[4] Despite this FCC ruling, however, utilities generally require telecommunications carriers to sign an agreement and deny access in the absence of an agreement. Accordingly, it is appropriate for the FCC to reiterate in this proceeding that a pole attachment agreement, while preferred, is not required for a telecommunications carrier to access utility-owned and controlled poles, conduit or right of way to install telecommunications facilities.

KMC also encourages the Commission to address the issue of timely completion of make-ready and processing of permits as a component of pole access. Utility delay in identification, completion or approval of make-ready work as a precondition to pole access can restrict a telecommunications carrier's access to poles months after the signing of a pole attachment agreement. Like ICG, KMC has received unreasonable requests from utilities to subdivide and process a limited number of poles for make-ready and installation rather than processing poles for the entire route. In addition, utilities frequently advise KMC that they can not provide a specific time frame for completing a preliminary field survey of the poles for

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[3] See ICG Comments at 5.

[4] First Report and Order, In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, 11 FCC Rcd 15,449, CC Docket No. 96-98, released August 8, 1996, 61 Fed. Reg. 45, 476 (1996) ("Local Competition Order") at para. 1160, rev'd in part, Iowa Utilities Board v. Federal Communications Commission, 1997 Westlaw 403401.

which access is sought or for identification of the make-ready. These processes often extend well beyond the 45 day period the FCC has set for providing pole access. Accordingly, KMC encourages the Commission to adopt ICG's proposal that utilities be required to delegate permit review and make ready work to outside contractors or attaching entities when necessary to timely pole access.[5]

KMC strongly opposes as burdensome and adding to the delay for pole access, the proposal by several utilities that the FCC impose a 180 day mandatory negotiation period before a complaint can be filed at the FCC.[6] This six month process is at odds with the FCC's recognition in the Local Competition Order of the need for prompt access by telecommunications carriers to poles, conduit and rights-of-way and would stymie local competition. The FCC has established a deadline of 45 days for utilities to act on a telecommunications carrier's application for pole attachments.[7] This time frame provides a utility ample opportunity to review and negotiate the request for access while balancing the critical nature of pole attachments for competitive providers. In KMC's experience, this time frame is more than adequate. At the beginning of negotiations, the utility's position and requirements for pole access are well defined and established as well as the utility's willingness to negotiate the terms of the agreement. A minimum negotiation period, would only add to the delay factor that utilities could use as leverage against telecommunications carriers to obtain agreements that violate Section 224. In addition, KMC objects to the United State Telephone Association's proposal that telecommunications carriers be required to provide a notice of intent to file a complaint.[8] When negotiations are at a stalemate, that is clear to the negotiating parties. There is no need for advance notice of its intention to file a complaint at the FCC and the FCC should not impose one.

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5 ICG Comments at 26.

6 See Duquesne Light Company Comments at 18; Ohio Edison Company Comments at 17; Union Electric Company Comments at 17.

7 Local Competition Order at para. 1224.

8 USTA Comments at 2-3.

III. Different Rates for Telecommunications Carriers Violate Section 224 When Included in "Negotiated Agreements"

The FCC should resist attempts by utilities to eliminate the requirements of Section 224 by declaring unjust and unreasonable agreement terms that require a telecommunications carrier to waive its rights to seek FCC review of the rates, terms and conditions of pole attachment agreement. In direct contradiction of the statutory requirement for non-discriminatory access and the requirement for non-discriminatory rates, several utilities seek a declaration by the FCC in this proceeding that utilities are free to charge telecommunications carriers different rates and be immune from challenge under Section 224 of the Act. [9] These requests violate the statutory requirement for non-discriminatory access and non-discriminatory rates and provide a glimpse of the demands that are made, and will continue to be made, by utilities in negotiating pole attachment agreements. Discrimination is also one of the key factors Congress sought to eliminate in the 1996 Act amendments to Section 224:

> Section 105 of the House amendment is intended to remedy the inequity of charges for pole attachments among providers of telecommunications services.[10]

Furthermore, in its Local Competition Order the FCC correctly ruled that the requirement of non-discrimination in Section 224 requires that the rates, terms and conditions be "uniformly applied" to all telecommunications carriers seeking access. [11] One way to ensure non-discrimination is to require that pole attachment agreements include a most favored nations clause as proposed by ICG in its comments.[12] A most favored nations clause, which utilities generally have resisted in pole attachment agreement negotiations and oppose in their comments, would result in rates between telecommunications carriers that

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[9] See Union Electric Comments at 17: Ohio Edison Comments at 17; Duquesne Comments at 19; Joint Comments of Edison Electric Institute and the Utilities Telecommunications Council ("UTC Comments") at 6.

[10] CONFERENCE REPORT on S.652, 104th Cong., 2nd Sess. (Jan. 1996) at 206 (emphasis added).

[11] Local Competition Order at para. 1156.

[12] See ICG Comments at 16

are uniformly applied and protect utilities against claims of discrimination.

IV. The Commission Should Continue to Use Historic Costs in Applying the Rate Formula

Several utilities advocate in their comments that the Commission move from a historic cost approach to a forward looking cost-basis for determining pole attachment rates.[13] The utilities have requested that the Commission change its cost-basis for cable television systems in the Commission's pending rulemaking under Section 224(d). Any change adopted in the cost-basis for pole attachments must be uniformly applied to the rate formula for cable operators under Section 224(d) and the rate formula adopted by the Commission pursuant to Section 224(e) of the Act.

KMC does not believe there is a compelling reason for the FCC to shift from historic to forward looking costs for several reasons. First, historical costs are known and can be verified. Utilities can use existing pole data to develop historical pole costs that reflect the status of their current pole inventory. Often a utility's inventory is composed of a variety of poles of different age. The historical costs for these poles can be evaluated and often are adjusted on an annual basis to reflect changes to the pole inventory. It is not clear from the comments filed in this proceeding, how forward looking costs would be identified or verified. Certain assumptions would have to be made about pole replacements that would require the use of predictions and forecasts rather than known facts.

Second, in amending Section 224 in 1996, Congress did not require the FCC to move from its current use of historic costs to forward looking costs in determining pole attachment rates. In the amendments to Section 224 of the Act, Congress was well aware of the FCC's rules for pole attachments under Section 224(d). Congress made precise changes to the allocation of pole costs to telecommunications carriers in Section 224(e). Missing from the 1996 amendments and the legislative history of the 1996 Act is a similar intent or statutory requirement that the FCC use "market-based" rates or forward looking costs in calculating pole attachment rates under Section 224(e). If Congress had wanted to change the cost-basis for determining pole attachment rates this change could have been included in the 1996 Act amendments.

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[13] See e.g., UTC Comments at 8; Joint Electric Utilities Comments at 17.

V. Overlashing by An Attacher Should Not Be Subject to a Separate Fee

A wide range of comments filed in this proceeding do not oppose overlashing as a means of expanding network capacity.[14] Several commenting parties distinguish overlashing performed by an entity that already has an attachment from that engaged in by a third party.[15] KMC believes this is a valid distinction. If the overlashing is performed by a telecommunications carrier that already has an attachment, there is no need for an additional approval process or separate fee since the overlashing does not increase the space occupied on the pole. In addition, many of the commenting parties oppose an assessment of pole attachment fees based on "burden" rather than occupied physical space.[16] Accordingly, where a telecommunications carrier with an attachment overlashes its own attached facilities there should be no additional requirements. Any additional pole support requirements can be handled under the existing pole attachment agreement. Attachment agreements between telecommunications carriers and utilities generally include terms that address modifications to attachments and obligate the telecommunications carrier to assume responsibility for additional make-ready costs and other costs caused by the modification. These contractual provisions are consistent with Section 224(i) and provide utilities ample protection against any additional pole support required for the overlashing.

KMC agrees with the commenting parties that propose that overlashing by a third party – not affiliated with an attacher – require a separate pole attachment agreement. This contractual requirement would create a direct relationship between the overlasher and the pole owner rather than a indirect relationship through the attacher. Third party overlashers should also be required to pay separate pole attachment fees. Furthermore, third parties who overlash another provider's attachment should be treated as an attaching entity in allocating unusable space. In addition, the allocation of usable space should be

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[14] See e.g., SBC Communications, Inc. Comments ("SBC Comments") at 9; ICG Comments at 19; National Cable Television Association Comments at 7.

[15] See e.g., USTA Comments at 6; SBC Comments at 9.

[16] See e.g., Ameritech Comments at 9; USTA Comments at 9; AT&T Corp. Comments at 6.

divided to allocate one-half of the space to the original attacher and the remaining one-half to the third party overlasher.[17]

VI. Dark Fiber Leasing Should Not Be Subject to a Separate Fee or Restricted

The commenting parties, including several utilities, agree that dark fiber leases entered into between a telecommunications carrier and a third party should not require an additional pole attachment agreement and should not be restricted.[18] As aptly demonstrated in the comments, dark fiber leases do not increase the occupancy of a pole and therefore do not justify the imposition of an additional attachment fee. In addition, dark fiber leasing encourages efficient use of existing facilities. Consistent with the comments, the FCC should prohibit utilities from restricting dark fiber leasing or imposing a separate or increased pole attachment rate on telecommunications carriers.

KMC strongly objects to the suggestion by Texas Utilities Electric Company that a dark fiber lease would remove a telecommunications carrier from the class of telecommunications carriers protected by Section 224.[19] Under Section 224, telecommunications carriers are all providers of telecommunications services except ILECs. The classification is not service specific nor is it dependent on the mix of services as suggested by some utilities that seek to circumscribe the scope of Section 224.[20] The primary goal of the 1996 Act amendments to Section 224 is to subject all providers of telecommunications services, including those offering telecommunications services using cable television systems, to the same pole attachment rates. Since the offering of cable telecommunications services along with telecommunications services does not kick a carrier out of the classification of a telecommunications carrier under Section 224(e), the offering of a wide range of services including dark fiber leases similarly does not remove a telecommunications carrier from the scope of Section 224(e). Therefore, the Commission should clarify in

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17 See ICG Comments at 21.

18 See e.g., Union Electric Comments at 26; Duquesne Comments at 20; Ohio Edison Comments at 28.

19 Texas Electric Utilities Comments at 4.

20 See e.g., Joint Electric Utilities Comments at 9.

this proceeding that telecommunications carriers as a class are protected under Section 224 and that Section 224(e) is not service specific.[21]

VII. All Attachers Must be Counted in the Allocation of Unusable Space

Section 224(e) specifically requires that two-thirds of the unusable space be allocated as would be allocated under an equal apportionment of such costs to "all attaching entities". The choice of terms is significant and encompasses all entities attached to a pole, conduit or right-of-way not just those subject to rate protection pursuant to Section 224. The phrase "all attaching entities" does not use defined terms. While "telecommunications carrier" is specifically defined in Section 224(a) as well as "pole attachment" these specifically defined these terms are not used in the allocation of unusable space. Some commenting parties have attempted to read a more limiting term into this phrase. Such a restrictive reading is not supported by the definitions of Section 224. Accordingly, to implement the statute, the FCC must include all attaching entities attaching to a pole, conduit or right of way, without exception, in the allocation of unusable space. These entities include ILECs, government entities and all other attachers. While ILECs are excluded from the category of "telecommunications carriers" under Section 224, there is no basis for excluding them from the broad category of "all attaching entities". Accordingly, ILECs must be included in the allocation of unusable space even when they are the pole owner.[22] Similarly, Congress did not make inclusion of "attaching entities" dependent on their payment of fees or compensation to the pole owner

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[21] While the 1996 Act amendments eliminated that distinction drawn between telecommunications providers that provide service over cable television facilities and non-cable television facilities, the class-based protections still apply to telecommunications carriers under Section 224. Furthermore, KMC believes that any offering of telecommunications services by a cable television system provider requires that the provider be subject to the telecommunications carrier rate under Section 224(e) in 2001 and that the formula is not intended to be applied by subscriber use as suggested by some cable television providers in their comments.

[22] It is appropriate to include the ILECs as attaching entities in the allocation even when they are the pole owner. While the ILECs seek similar treatment to electric utilities, the Commission has proposed to count electric utilities as attachers when they provide telecommunications services. Accordingly, similar treatment requires that ILECs providing telecommunications services be included as well.

making it appropriate to include municipal governments in the category of attaching entities.[23]

VIII. Accurate Presumptions on The Number of Attachers is Critical to Section 224

The methodology for allocating space and allocation of costs for modifications require accurate and updated presumptions of the number of attachments. As KMC described in its initial comments, field surveys are routinely done before the installation of an attachment. This field surveys can be used to determine the number of attachers. If the Commission chooses not to adopt a specific requirement, it must at a minimum require that the utilities disclose the information and methodology on which their presumptions are based. A wide range of commenting parties support this approach.[24] In addition, separate presumptions must be developed for urban, rural and suburban areas.[25] Given the sensitivity of the rate formula set forth in Section 224(e) to the number of attachers only presumptions by different demographic areas will provide the protections intended by Congress. A nationwide, state-wide or utility-wide presumption will not reflect the development of competition and could saddle providers in competitive markets with more cost allocations then intended by Congress.

IX. Safety Space Should Be Allocated as Unusable Space

KMC supports the allocation of the 40 inch safety space as unusable space to be allocated pursuant to Section 224(e)(2). The safety space is not attributable to one particular entity but rather benefits all attaching entities. In addition, commenting parties have indicated that at times the safety space may be used for certain authorized purposes. In other areas the safety space remain vacant. Accordingly, to provide equitable treatment of the safety space, KMC supports the allocation of the 40 inch space as unusable space allocating to all attaching entities and telecommunications carriers pursuant to the formula set forth in Section 224(e).

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[23] Competitive carriers commonly are required to obtain municipal franchises or permits to install their facilities in public rights-of-way. Many local governments assess fees for this use while similar fees may not be paid by the pole owners.

[24] See e.g., Ameritech Comments at 13; Joint Electric Utilities Comments at 44.

[25] See ICG Comments at 36.

X. The FCC Should Adopt a Specific Conduit Formula

The FCC must adopt a specific formula for maximum conduit rates to provide certainty in regulation and negotiations. The lack of an FCC rate formula has resulted in widely divergent conduit rates throughout the country and no means of assessing the reasonableness of the rate. KMC has been advised repeatedly by utilities in negotiations for access to conduit that the utility does not know how to apply the FCC's formula to conduit occupancy. This experience demonstrates the need for a specific FCC formula. The FCC should reject the suggestion made by commenting parties that the Commission continue with a state of uncertain regulation that will permit utilities to develop their own theory of appropriate conduit rates.[26] If the conduit rates are unreasonable today, even though they are subject to the requirements of Section 224(d), the unreasonableness of the rates will be magnified in 2001 if the FCC does not adopt precise rules in this proceeding for conduit rates.

Safety concerns are not a basis for creating different rate structure for conduit owned and controlled by ILECs and electric utilities. KMC has installed its facilities in electric utility conduit in a number of its markets. In these networks, KMC has addressed any reasonable safety concerns raised by the electric utilities by agreeing to hire outside contractors approved by the utility for installation or in some cases to use the electric utility's own personnel. These practices have effectively managed any real safety issues and demonstrate that telecommunications facilities can be efficiently and safely installed in electric utility conduit.

XI. The FCC Should Adopt a Specific Right-of-Way Formula

The FCC should use this proceeding to develop a formula or methodology for determining maximum fees for access to utility owned and controlled rights-of-way. KMC supports the proposal by AT&T to permit utilities to recover their direct costs for permitting access to the rights-of-way for a telecommunications carrier's pole attachment.[27] Utilities should be required under this approach to provide the telecommunications carrier seeking access the basis for its rate formulation. This approach would provide a flexible methodology that should address the concerns about local and state law issues

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[26] See e.g., Joint Electric Utility Comments at 56.

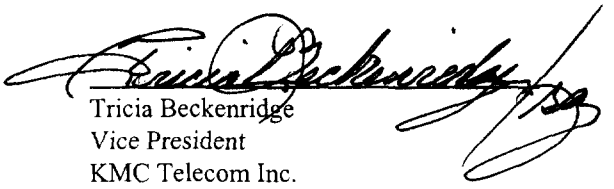
[27] AT&T Comments at 17-19.

raised by the utilities in their comments.

XII. Cable Television Providers Should Be Required to Certify Their Status Annually

The parity intended by Congress in the 1996 Act can only be achieved if cable television system providers are required to certify on an annual basis to utilities and the FCC that they are providing solely cable television services. This requirement should become effective with the effective date of the rules adopted in this proceeding (i.e. 2001). Third parties, including telecommunications carriers, should be permitted to refute the certification and request that the pole attachment rate be adjusted by the utility with a pole attachment agreement with the cable television system.

Respectfully submitted,



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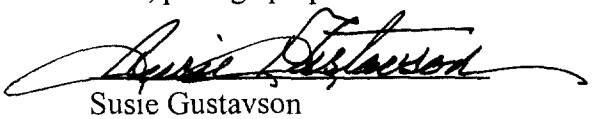
Dated: October 21, 1997

CERTIFICATE OF SERVICE

I, Susie Gustavson, hereby certify that on this 21st day of October 1997, a copy of the foregoing Reply Comments of KMC Telecom Inc. was served on the following parties of record in this proceeding by United States mail, postage prepaid.



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